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## DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-186456

DATE: March 29, 1977

MATTER OF: E. R. Hitchcock & Associates

### DIGEST:

1. Protest against resolicitation of requirements for thermal shipping containers is denied where record indicates reasonable basis exists for resolicitation in that specifications were defective and Government's minimum needs not adequately stated.
2. Negotiations with protester under original RFP following termination for convenience of negotiated contract are precluded since original RFP was defective.

E. R. Hitchcock & Associates (Hitchcock) protests the rejection of its offer and the determination of the contracting officer to resolicit the requirements called for under request for proposals (RFP) No. 7646(c) issued by the Department of Health, Education, and Welfare (HEW), Public Health Service (PHS), Food and Drug Administration (FDA).

The subject RFP, issued on January 9, 1976, called for 1,000 each small and large "Thermal Shipping Containers" which are to be used in shipping etiologic agents. The RFP defines an etiologic agent as " \* \* \* a viable microorganism or its toxin, which causes or may cause human disease \* \* \*." HEW reports that the containers are specialized items which must provide an unusual degree of protection for the materials being shipped in order to avoid accidental spilling of hazardous substances. It is further stated that the subject requirement was to be obtained by negotiation due to the Government's inability to develop specifications which were sufficiently definitive to permit formal advertising.

In order to obtain containers considered safe for shipment of toxic materials, the RFP required the submission of samples which were " \* \* \* subject to visual examination, testing for terminal capacity, durability, and functional performance by the U.S. Bureau of Standards, or an independent testing laboratory." The RFP further specified

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that the containers be constructed and insulated so as to pass certain performance and impact drop testing requirements as enumerated in the RFP. Amendment 1 to the RFP was issued to change certain dimensions and change the performance testing requirements.

Offers were received from Hitchcock and the Hollinger Corporation (Hollinger) by the February 27, 1976, closing date. It is reported that the evaluation of offers was limited to a visual examination which included a trial closure of sample containers with pressure sensitive tape as in actual usage since they were intended to be reused for indefinite periods. FDA discovered that removing the sealing tape from the Hitchcock containers tore the polyethylene film added by the offeror for water protection and ease of tape removal. The torn areas, by extending beyond the taped areas, nullified the water protection capability of the containers after the initial usage. This was considered an unacceptable defect by FDA in view of the high degree of protection required for shipment of hazardous substances. In view of this deficiency in Hitchcock's proposal, the procuring activity states that Hollinger's offer was the only acceptable offer. The PHS states that there was no apparent attempt to conduct the performance testing specified in the RFP. Award was made to Hollinger and thereafter a protest was filed in our Office by Hitchcock.

The PHS states that during the review of the protest, FDA realized that its specifications only addressed thermal and stress performance requirements. The specifications did not adequately cover certain minimum requirements such as water protection and the ability to withstand the sealing/opening operations of actual usage. Further, the PHS states that the RFP did not inform offerors of the importance of price with relation to the other factors and did not indicate that containers would be tested by sealing and opening with pressure sensitive tape. In view of the defective specifications and the RFP defects regarding evaluation factors, Hollinger's contract was terminated for convenience effective July 12, 1976.

Hitchcock contends, assuming that its containers pass the required tests, that resolicitation is unnecessary and that the procuring activity should negotiate with its firm and make an award to it under the original RFP. Hitchcock states that this would require the testing of its containers to determine whether they meet the standards of physical integrity and the thermal testing requirements. The protester also contends that the admitted inadequacies in the procurement cannot be fairly corrected by merely affording its firm an opportunity to bid under a resolicitation since its prices, design techniques and other information are known to the other potential offerors.

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The question for our consideration is whether resolicitation is justified in light of the procuring agency's contentions that the specifications enumerated in the RFP failed to adequately reflect the needs of the Government and the proposals were not evaluated in the manner set forth in the RFP.

We believe that any award to Hitchcock under the original RFP would be improper since the RFP was defective in that it failed to clearly and adequately describe the technical requirements for shipping containers, including the procedure for determining that the requirements have been met. See Parkson Corporation, B-187101, February 11, 1977, and cases cited therein.

The record also discloses that HEW's determination to resolicit the requirement was reasonable in that the specifications were defective and the proposals were not evaluated in the manner stipulated in the RFP. In this regard the RFP contained a purchase description which incorporated certain test requirements as a performance specification. Compliance with the specifications was ascertainable only through testing and HEW states that the necessary testing was not conducted. Further, HEW reports that the specifications did not adequately cover certain minimum requirements such as water protection and the ability to withstand the sealing/opening operations of actual usage. See Semiconductor Equipment Corporation, B-187159, February 18, 1977. FDA states that any new solicitation must require that the exterior and interior containers be fabricated of a completely weatherproof grade of fibre-board. By resoliciting, FDA will be able to accurately describe its technical requirements for shipping containers, including the procedure for determining that the requirements have been met.

Even if defects in the RFP had been discovered during negotiations, Federal Procurement Regulations § 1-3.805-1(d) (1964 ed. amend. 153) requires the following:

"When, during negotiations, a substantial change occurs in the Government's requirement or a decision is reached to relax, increase, or otherwise modify the scope of the work or statement of requirements, such change or modification shall be made in writing as an amendment to the request for proposals, and a copy shall be furnished to each prospective contractor."

Under the provision of this regulation, negotiations with Hitchcock alone would be precluded since all potential offerors must be given an opportunity to compete on an equal basis.

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The procuring agency's decision to terminate Hollinger's contract and resolicit the requirements is viewed by our Office as similar to an agency's determination to cancel an RFP. We have held that a decision to cancel an RFP is subject to objection upon review by our Office only if it is clearly shown to be without a reasonable basis. See Federal Leasing, Inc., 54 Comp. Gen. 872 (1975), 75-1 CPD 236. The same standard of review applies to an agency's determination of its minimum needs and to the agency's drafting of specifications which properly reflect those needs. Julie Research Laboratories, Inc., 55 Comp. Gen. 374 (1975), 75-2 CPD 232.

For the reasons stated, we believe HEW's decision to resolicit its requirements for thermal shipping containers is reasonable. Accordingly, Hitchcock's protest is denied.

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Deputy Comptroller General  
of the United States